87-1678

Supreme Court, U.S.
FILED
APR 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

W. E. JOHNSON, Warden,

RESPONDENT - APPELLANT,

VS.

CHRISTOPHER DEMOS,

PETITIONER - APPELLEE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT
OF APPEALS

BRIEF AND ARGUMENT IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

I

Does evidence of a history of substance abuse, without any evidence of an inability to assist his attorney in his defense, require a state court to find that there is a bona fide doubt about the defendant's competency to stand trial under Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)?

PARTIES

In the Circuit Court of Baldwin County, Alabama, and in the Court of Criminal Appeals of Alabama, the parties were Christopher Demos as Defendant and Appellant, respectively, and the State of Alabama as Plaintiff and Appellee, respectively. In the United States District Court for the Southern District of Alabama, and in the Eleventh Circuit Court of Appeals, the parties were Christopher Demos as Petitioner and Appellee respectively and W. E. Johnson, Warden, as Respondent and Appellant respectively.

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OPINION BELOW

The decision and opinion of the Eleventh Circuit Court of Appeals, when reported, will be reported as follows:

Christopher Demos v. W. E. Johnson, Warden, ___ F.2d 1206 (11th Cir. 1988)

A copy of the same is also appended to the petition as Appendix "A".

JURISDICTION

Petitioner seeks review pursuant to this Honorable Court's jurisdiction under 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's claim involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

PRACTICAL REASON FOR GRANTING CERTIORARI

1) The Eleventh Circuit's holding which essentially requires a psychiatric evaluation merely on the allegation of prior drug abuse differs radically from other Circuits on this important issue and this conflict needs to be settled by this Court;

2) The Eleventh Circuit's holding that the pre-trial hearing to determine if there was reasonable grounds to doubt Petitioner's competency was not a Pate hearing is erroneous since the procedure followed by the trial court was adequate to protect Petitioner's right not to be tried while incompetent as required by Pate, supra;

3) The Eleventh Circuit's opinion, if left to stand, would require a psychiatric examination into competency to stand trial in most cases

where the defendant is a prior drug abuser;

4) The district court's and the Eleventh Circuit's factual redetermination violated this Court's holding in Maggio v. Fulford, 462 U.S. 111, 103 S.Ct. 2261, 76 L.Ed.2d 794 (1983), in that the state court's determination of competency was "fairly supported by the record" and should not have been disturbed.

STATEMENT OF THE CASE

[All page numbers refer to the pages of the State Trial Transcript and all Exhibits refer to the documents contained in the Federal District Court Record.]

(A)

COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE COURT BELOW

Petitioner was indicted on October 15, 1975, by the Grand Jury of Baldwin County, Alabama, on the charge of

Murder in the First Degree [State Trial Transcript (hereinafter STT), page 172]. He was arraigned on October 20, 1975, and was represented by the Honorable Ernest Bailey and the Honorable Lloyd Taylor [STT, page 174].

After the arraignment, but prior to trial, Petitioner filed a motion for an examination by a private psychiatrist and a motion stating that Petitioner was unable to aid in his defense [STT, page 174, 176]. After a hearing on the motions, both were denied [STT, page 14, 55]. The case proceeded to trial and on November 13, 1975, the jury found Petitioner guilty as charged and it fixed his sentence at life in the penitentiary of the State of Alabama [STT, page 169].

On October 8, 1983, Petitioner filed a habeas petition in the United States District Court for the Southern

District of Alabama [Exhibit 1]. He alleged that he had been denied due process because the state trial court did not grant him a mental examination prior to trial [Exhibit 1], and amended his petition to include a claim that a pre-trial agreement had been reached with the Court regarding the granting of the request for the mental examination and that the agreement had been breached.

Eventually four (4) evidentiary hearings were held on this petition. Evidence and testimony produced at the hearing are explained in detail in the Statement of the Case. However, at the end of the hearings, the district court found that a pre-trial agreement by the state trial court to send Petitioner for a mental examination existed and that the court failed to comply with the agreement.

On appeal, the Eleventh Circuit, in a written opinion decided on January 15, 1988, reversed the district court's granting of the writ on the basis of the alleged pre-trial agreement, but affirmed the granting of the writ on the basis that the State court had failed to comply with this Court's decision in Pate v. Robinson, supra, when it denied the motion for a mental examination prior to trial. From this decision, the Respondents seek certiorari to review the legal conclusion of the Eleventh Circuit.

(B)

STATEMENT OF THE FACTS

Prior to his original trial in state court, Petitioner apparently filed a motion seeking examination by a private psychiatrist on his competency to stand trial because of a purported

history of mental treatment somewhere in Ohio [STT, page 4]. The motion was argued on November 5, 1975, without benefit of any medical records of the prior mental treatment because the records, which had been ordered, had not been received by his defense counsel [STT, page 4]. Defense counsel argued that Petitioner probably had some brain damage from the use of drugs [R-8]. The court decided to continue the hearing on the motion to allow defense counsel additional time to bring forth evidence to support his motion [Stt, page 9]. On November 7, 1975, the court again heard Petitioner's argument, and again Petitioner informed the court that the medical records had not been received [Stt, page 11]. Petitioner withdrew his motion for a private psychiatric examination [STT, page 12] and the court allowed Petitioner to present evidence

on his claim that he was incompetent to presently aid in his own defense [STT, page 14]. Petitioner's only evidence to support his claim of incompetency was the testimony of his mother who stated that Petitioner had undergone psychiatric treatment for sniffing glue [STT, page 15] when he was in the seventh and eighth grade [STT, page 17] and was thirteen years old [STT, page 17]. She testified that when Petitioner was not on glue, he was completely normal and was different from the way he was when he was under the effects of the glue [STT, page 15, 17]. Petitioner was twenty-five years old during the trial of this cause [STT, page 36].

In rebuttal, the State presented the Baldwin County Jailer, Jimmy Hartner, [STT, page 36] who testified that Petitioner did not have access to any glue while incarcerated at the jail

[STT, page 37, 38]. He further testified that Petitioner did nothing out of the ordinary while he was confined at the jail [STT, page 37, 38].

On November 13, 1975, prior to the trial, the court questioned Petitioner on his desire to dismiss his attorneys [STT, page 54]. The court found that his conversation with Petitioner confirmed that he was competent to stand trial [STT, page 55]. Petitioner had earlier stated to the court that he could mentally assist in the conduct of the trial [STT, page 52]. Petitioner was then tried and convicted of the brutal murder of his wife [STT, page 168] where the evidence showed that, just prior to the murder, Petitioner had forced his wife and his stepdaughter to perform unnatural sex acts on each other and then forced them to perform the acts on him [STT, page 132].

After the federal habeas petition was filed, an evidentiary hearing was granted.

The Magistrate eventually found that the state trial court had failed to adequately inquire into Petitioner's competency to stand trial and then recommended that the court hold a hearing to receive evidence on whether Petitioner's competency to stand trial could be determined at this late date [Exhibit 29]. The district court judge adopted the Magistrate's finding that the state trial court had failed to comply with Pate v. Robinson, 383 U.S. 375 (1966) and that the state trial court had failed to carry out the alleged agreement as required by Acosta v. Turner, 666 F.2d 949 (5th Cir. 1982). [Exhibit 32].

On December 19, 1984, Respondent introduced testimony of Dr. Harry

McClaren who stated that Petitioner, at the time of the trial, probably understood that he was under a charge of murder and probably could have assisted his attorneys at the time of trial [Vol. 4, page 26]. However, Dr. McClaren could not give a firm opinion without personally examining the Petitioner [Vol. 4, page 26], although he was able to conclude that the medical records from Ohio, which had been introduced by Petitioner at the evidentiary hearing, would not have established that Petitioner was incompetent to stand trial even if they had been obtained for the original trial [Vol. 4, page 27]. After this hearing, Respondent asked the court to allow it to perform a mental examination on the Petitioner since Dr. McClaren had testified that it was possible to determine his competency if an examination was done [Exhibit 39].

The request for examination was granted [Exhibit 40] and Petitioner was admitted to the Taylor Hardin Medical Facility [Exhibit 42].

A final evidentiary hearing was held on February 27, 1985, in which the Respondent presented testimony by Lester Smith, a Psychologist II with the Alabama Department of Corrections [Vol. 5, page 13], who examined Petitioner when Petitioner was admitted to the prison system shortly after his conviction [Vol. 5, page 14]. He found Petitioner to be operating in the high average range of intellectual capacity [Vol. 5, page 16]. Petitioner was able to communicate effectively and answer most of the questions asked of him [Vol. 5, page 18].

Dr. Harry McClaren also testified at this hearing [Vol. 5, page 19]. He testified that Petitioner was confined

at the medical center for three weeks where his behavior was observed around the clock [Vol. 5, page 30]. Certain x-rays were performed to check for brain damage [Vol. 5, page 30]. All were normal [Vol. 5, page 30]. Dr. McClaren concluded that Petitioner could have responded to specific questions that would have been asked by his defense attorneys at the trial [Vol. 5, page 38]. He also testified that he could find no evidence to suggest that Petitioner was incompetent for trial [Vol. 5, page 30], or any evidence that Petitioner had suffered from a major mental illness [Vol. 5, page 39]. Under questioning by the Magistrate, Dr. McClaren stated that he saw no evidence of mental retardation and then stated that he could not find anything unusual that would have made him unable to work with his lawyers [Vol. 5, page 67].

In its final order, the district court granted the writ on the basis of the pre-trial agreement and ordered the Respondent to either re-try or release the Petitioner [Exhibit 54].

SUMMARY OF THE ARGUMENT

A history of drug abuse, without more, does not require a state trial court to find that the defendant is incompetent to stand trial. A defendant must at least present sufficient evidence that he is unable to assist his attorneys in his defense before the trial court is required to grant a mental examination. Due process does not require that a psychiatric examination be granted merely because it

is requested; it only requires one when there is a bona fide doubt about the state of defendant's competency.

The Eleventh Circuit's decision in this case conflicts with decisions of other federal courts that have decided the issue raised herein, and since this decision raises the specter of the State having to grant a mental examination everytime a defendant shows that he has abused drugs in the past, this decision needs to be reviewed very closely by this Court.

Lastly, the granting of the writ on the basis that the trial court erroneously decided the Pate issue in this case apparently conflicts with this Court's prior decision which requires the federal courts to accept the findings of the State Courts if those findings are "fairly supported by the record". The district court and the

Eleventh Circuit overturned the state court's decision merely because they drew a different inference from the evidence; neither court found that the trial court's decision was totally unsupported by the evidence.

ARGUMENT

I.

(A)

MERE EVIDENCE OF A HISTORY OF SUBSTANCE ABUSE, WITHOUT MORE, DOES NOT REQUIRE A STATE TRIAL COURT TO FIND THAT THERE IS A "BONA FIDE" DOUBT ABOUT DEFENDANT'S COMPETENCY TO STAND TRIAL UNDER PATE V. ROBINSON, 383 U.S. 373, 86 S.Ct. 836, 15 L.Ed.2d 815.

In the seminal case of Pate v. Robinson, supra, this Court held that a trial court is required to sua sponte conduct an inquiry into a defendant's mental capacity if the evidence raises a bona fide doubt as to the defendant's

competency at the time of trial. Later in Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), the Court apparently lessened the burden of proof for the defendant and, in effect, held that it would constitute a Pate violation if, "in light of what was known to the trial court, the failure to make further inquiry into petitioner's competence to stand trial denied him a fair trial" L.Ed.2d at 115. The question raised by this petition is whether evidence of habitual drug use, without more, raises a bona fide doubt about one's ability to stand trial under Pate or requires the trial court to further inquire into defendant's competency under Drope by ordering a psychiatric examination prior to trial.

This, of course, is a question of first impression for this Court. However, the vast majority of courts

hold that such a defendant is not per se rendered incompetent for trial purposes. For example, in Reed v. U.S., 529 F.2d 1239 (9th Cir. 1976), cert. denied, 429 U.S. 887, 50 L.Ed.2d 169, the court held that the abstract fact that the defendant was either addicted to or under the influence of drugs would not be conclusive on whether he was incompetent to stand trial; the question to be answered was whether the use of drugs impaired his ability to consult with his attorney and effectively assist his attorney in the preparation of his defense. Id, at 1240, 1241.

The Fifth Circuit, like the Ninth Circuit, holds that mere influence of narcotics is not sufficient for a finding of incompetency. In U.S. v. Robinson, 530 F.2d 677 (1976), where a defendant who allegedly had taken heroine two days prior to trial and,

because of such influence, allegedly fell asleep during trial, it was held that the defendant was in fact competent. The court stated:

> "[t]he fact that a defendant is under some influence of narcotics does not per se render that defendant incompetent to stand trial." Id. at 679

In Robinson, the court placed more emphasis upon the questions asked of the defendant and the responses thereto than on the mere fact that he had used drugs prior to the trial.

The Second Circuit, in United States v. Olivier, 626 F.2d 254 (1980), discussed the effect of a prior history of heavy drug use in assessing competency to stand trial, and stated that "[t]he use of drugs is merely a relevant factor in the trial judge's determination". Id. at 259. There, the court concluded that the intelligent

responses to the questions evidenced no confusion or lack of understanding and supported the trial court's finding that a psychiatric examination was not needed to establish competency.

Again, the Ninth Circuit, in Boag v. Raines, 769 F.2d 1341 (1985), held that the defendant, who had attempted suicide five times, who had a history of bizzare behavior and who had a history of alcoholism was properly denied a psychiatric examination because there was no evidence that had caused any mental impairment at the time of trial. Id. at 1343.

In the instant case, the Eleventh Circuit's decision severely conflicts with the decisions of the other circuit courts cited above. At the state trial hearing prior to trial, the only evidence to support Petitioner's claim of incompetency was that he was an

habitual drug user and that, as a teenager, he had undergone substance abuse treatment and psychiatric treatment wherein the psychiatrist had declared Petitioner sane enough to understand right from wrong. Hence, there was simply no basis for the district court or the Eleventh Circuit to find that his prior drug abuse had impaired his present ability to assist in his own defense.

The Eleventh Circuit also erred by considering the fact that Petitioner was under the influence of toluene at the time he committed the crime to help justify its conclusion that Petitioner was incompetent to stand trial:

> "Moreover, at trial the evidence showed that Demos was high on toluene when he committed the crime" [Eleventh Circuit's Opinion, page 1209].

By considering this fact to justify a finding of incompetency, the Eleventh Circuit committed the sin of equating the claim of insanity at the time of the offense with the claim of incompetency to stand trial. The two are distinctly separate claims. See Lee v. State of Alabama, 291 F.Supp. 921 (M.D. Alabama, N.D. 1967), by then District Judge Frank M. Johnson, citing, Dusky v. United States, 363 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). Thus, a defendant may have available the defense of insanity at the time of the offense but yet be competent enough to stand trial if he can assist his attorney in his defense. Drope, supra. The Eleventh Circuit simply erred by concluding that Petitioner was unable to stand trial because he was under the influence of a drug at the time he committed the offense.

Secondly, in addition to conflicting with other Circuits, this decision by the Eleventh Circuit does not comport with this Court's holding in Pate v. Robinson, supra. Pate would require a psychiatric examination only if there is enough evidence for a state trial court to find that there is a "bona fide doubt" as to the defendant's competency to stand trial. Since this Court has never prescribed a "general standard with respect to the nature or quantum of evidence" necessary to establish "bona fide doubt", Drope, Id. at L.Ed.2d at 113, the Eleventh Circuit obviously applied a liberal construction of "bona fide doubt" and the effect of its ruling is that any evidence in support of his Pate claim would suffice to require a psychiatric examination. The Respondents believe that in order to establish "bona fide doubt" about his

competency, the Petitioner would have to establish more than the abstract fact the he had abused drugs in the past; he would at least have to present enough evidence to meet the Drope test which requires the defendant to show that he presently is incapable of rationally assisting his attorneys in his own defense. Obviously, Petitioner did not meet this test in the instant case.

(B)

WHETHER THE ELEVENTH CIRCUIT'S INDEPENDENT REVIEW OF THE RECORD TO DETERMINE IF THE STATE COURT'S FINDING WAS CORRECT CONFLICTS WITH THIS COURT'S OPINION IN MAGGIO V. FULFORD, 462 U.S. 11, 103 S.Ct. 2261, 76 L.Ed.2d 794 (1983)

In Maggio, supra, this Court held that "[b]efore a federal habeas court undertakes to overturn factual conclusions made by the state court on a Pate issue, it must determine that these

conclusions are not 'fairly supported by the record'". 103 S.Ct. at 2264.

In denying Petitioner's motion for a pre-trial mental examination, the state court, after considering all the evidence held:

> "[The decision] was made on the lack of evidence that was before this court as to his insanity at the time of the crime and to his ability to aid in the conduct of this trial.....The conversation I had with Mr. Demos merely confirms what I had decided" [STT, page 54, 55] [Emphasis added].

In this habeas corpus petition, neither the district court nor the Eleventh Circuit deferred to the state court's finding, but, instead, seemingly made a de novo review of the record and simply drew different inferences from the evidence, without determining whether the inferences drawn by the State Court were supportable by the record.

It should be highly emphasized that of the three factors considered relevant to a determination of competency under Drope, (history of prior irrational behavior, prior medical opinions and demeanor at trial, Id, at 43 L.Ed.2d 118), only prior irrational behavior was supported by evidence at all. This evidence came in the form of Petitioner's mother's testimony about his drug use as a teenager, but she also testified to his normal behavior when there was no use of the drugs. No medical opinions or records were introduced into evidence, although there are disputed questions about whether the lawyers acted diligently enough to procure the records or whether there was inadequate time to obtain them. Regarding the defendant's demeanor at trial, the trial court found that Petitioner was able to assist his

attorneys and this conclusion should have been given upmost deference. In a nutshell, the district court and the Eleventh Circuit overturned the state court's judgement and granted this writ on the basis of a single Drope factor, even though the evidence on this one factor was debatable as to its probity, relevance and weight. Simply, there was no sufficient reason for the federal habeas courts to reverse the state court decision in the case sub judice.

CONCLUSION

This is not just simply another case seeking certiorari to reverse a lower court decision. Here, the case involves a brutal murder, which, if the State is required to retry, may not be fully prosecutable because of the difficulty of finding the witnesses involved in this 1975 trial. There is

no justice in allowing a brutal act such as involved in this case go unpunished on the basis that the State failed to accord the defendant his constitutional right to be tried while competent when the evidence of incompetency, if there was any at all, was so scant. The position taken by the Fifth Circuit would have been appropriate for the Eleventh Circuit to have taken in this case:

> "We have never suggested that a state court must conduct a full-blown competency hearing everytime there is the slimmest evidence of incompetency."

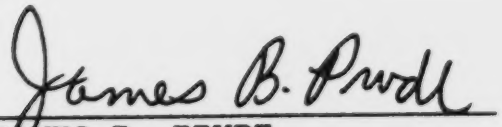
Holmes v. King, 709 F.2d 965, 967 (5th Cir. 1983).

Finally, if this decision is left to stand, it could place an unneeded and onerous burden upon the State financially because a psychiatric examination would be required each time

a defendant presents evidence that he has a background of drug use. In addition, because the federal courts gave no deference to the trial court's observation of petitioner during the pre trial hearings, the trial judge's role in observing the defendant at the hearing would be obliterated from the competency determination process and more credence would be given to the defendant's allegations than to demonstrated fact before the court.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
OF ALABAMA
BY-



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CERTIFICATE OF SERVICE

I, James B. Prude, a member of the Bar of the Supreme Court of the United States, do hereby certify that this 4th day of April, 1988, I did serve a copy of this petition and a copy of the accompanying appendix on Respondent by placing the same in the United States Mail, first class postage prepaid, and properly addressed to counsel of record for Respondent as follows:

Honorable Forrest S. Latta
Nettles, Baker & Janecky
P. O. Box 2987
Mobile, Alabama 36526

I further certify I have served all parties required to be served.

James B. Prude

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL
OF ALABAMA